



3765 #10/Appeal
A/B def
JLT
P-3906-1

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

APPLICANT: DONALD C. JOHNSON
JEFFREY SPILFOGEL

FOR: A SEAMLESS BRASSIERE SHOULDER STRAP

SERIAL NO.: 09/780,320

FILED: February 12, 2001

EXAMINER: John Calvert, Supervisory Patent Examiner, Technology Center 3700

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BRIEF OF APPLICANT

Hon. Commissioner of Patents
and Trademarks
Washington, DC 20231

Sir:

Applicant appeals the Final Rejection of 08/06/01 and herewith submits BRIEF OF APPLICANT.

1. **Real Party in Interest**

The applicant above named.

2. **Related Appeals or Interferences**

None.

3. **Status of Claims**

There is one claim on appeal as set forth in the appendix.

4. Status of Amendments After Final Rejection

The rejection under 35 USC 112, second paragraph was overcome but not the rejection under 35 USC 102(b).

5. Summary of Invention

Involved are brassiere shoulder straps, each in a desirable "seamless" construction, wherein by "seamless" is meant without inturned edges which, unavoidably, are manifested bulk on opposite sides of a clearance defining the seam (at application page 5, lines 3-5, hereinafter "A ____, L ____").

The construction is achieved using to advantage a known heat sealing and cutting technique common in plastic bag-manufacturing, as exemplified by U.S. Patent 5, 711,751 for "Hermetic Seal For A Plastic Bag" issued to Harmanoglu on January 27, 1998, incorporated in the application by reference pursuant to MPEP 2163.07(b) (A3, L 20-23 to A 4, L1).

Applicant has recognized that the finishing of the raw cut edges of the fabric assembly of the brassiere strap is the most significant source of discomfort and has achieved this required finishing step without turning under the edges (the technique used in the prior art and illustrated in Fig. 2), by fusing the fabric assembly at a selected site running along the raw cut edges and cutting off, and thereby removing, the raw cut edges by choosing as the location of the cut the site of the fusion. In a fused together condition the assembly is cut through cleanly and the fabric, consisting of weft and warp yarns, does not exhibit any fraying. More particularly, as illustrated in Fig 3, in the construction of the shoulder strap 30, using as previously noted the known heat sealing and cutting technique common in plastic bag-manufacturing, the assembled superposed arrangement of upper, intermediate, and lower fabric strips 32, 34 and 42 are urged in a machine direction 52 in processing relation past a rotary fusing or welding means 54 and

past a rotary cutting means 56, the former producing side weld lines 58, and the latter removing from the assembly the opposite selvages 48 at the site of the weld lines 58 which, in practice has been found to be free of fraying or any other fiber manifestation detracting from a neat finished appearance in a cut and seal line 60 at the side locations of the shoulder strap 30. The resulting approximately 1 inch wide brassiere shoulder strap 30 is thus without a telltale seam but also with finished side edges 60 (A 5, L 1-10).

6. Issues pursuant to 37 CFR 1.192(e)(6).

Whether claim 1 on appeal under 35 U.S.C. 102(b) is unpatentable over Hyames et al. (U.S. 5,165,113).

7. Grouping of Claims

Grouping does not apply.

8. Argument pursuant to 37 CFR 1.192(c)(8).

In support of the rejection, the examiner refers to the disclosure in Hyams et al, at column 2, lines 10-16 and lines 32-39. But this disclosure is of the pad 12, whereas the component in this cited reference most pertinent to the strap in issue is that designated 16 and referred to as "tab portions" in column 3, in line 15. For the Board's convenient reference, it is set forth below:

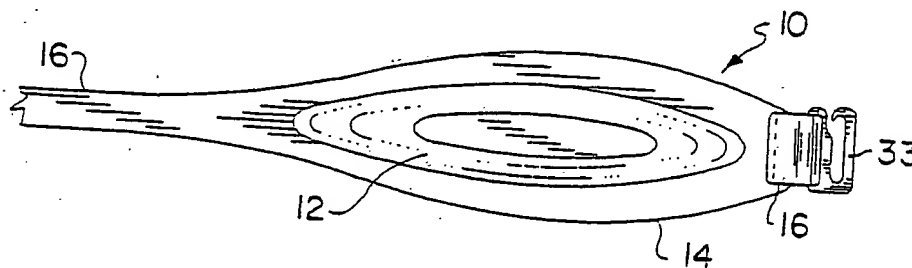


FIG. 1B

Component 16 does not anticipate the recitations of claim 1 either as to the unfinished work-in-process or finished conditions. Although it was not argued, assuming arguendo, the examiner is contending that the “fusing and die-cutting” technology of the construction of the pad 12 makes it “obvious” to also employ this technology to the construction of the tab/strap 16. The obviousness of this transfer of technology from the pad 12 to the strap 16 must be demonstrated. The test for obviousness is what the teachings of the Hyams et al. patent would have suggested to one of ordinary skill in the art. See, for example, In re Keller, 642 F.2d 413, 425, 208 USPQ 871, 881 (CCPA 1981). In establishing a prima facie case of obviousness, it is incumbent upon the examiner to provide a reason why one of ordinary skill in the art would have been led to make the transfer of technologies from the pad 12 to the strap 16 to arrive at the claimed invention. See Ex parte Clapp, 227 USPQ 972, 973 (Bd. Pat. App. & Int. 1985). To this end, the requisite motivation must stem from some teaching, suggestion or inference in the prior art as a whole or from the knowledge generally available to one of ordinary skill in the art and not from the appellant’s disclosure. See, for example, Uniroyal, Inc. v. Rudkin-Wiley Corp., 837 F.2d 1044, 1052, 5 USPQ2d 1434, 1439 (Fed. Cir.), cert. denied, 488 U.S. 825 (1988).

Stated somewhat differently, the fact that strap 16 could be modified does not make such a modification obvious in the absence of disclosure suggesting the desirability of doing so (In re Gordon, 733 F.2d 900, 902, 221 USPQ 1125, 1127 (Fed. Cir. 984)). Here, the examiner has provided no clue as to where support is found for his assumed reasoning as to the suggestion to make the strap like the pad, and therefore it stands merely as the examiner’s unsupported opinion. This being the case, the question arises as to why one of ordinary skill in the art would have been led to increasing the cost of production using the edge treatment for the strap that is used for the pad which cannot be offset by “mass production” savings.

The "mass production" savings alluded to is producing the strap in a lengthwise work-in-process configuration and the cutting thereof to length to produce the individual straps. Applicant finds none expressed in Hyams et al., and it thus would appear that the only motivation for doing so is found in the hindsight afforded one who first viewed the applicant's disclosures. This, of course, is not a proper basis for a rejection under Section 102(b).

Another basis for dismissing Hyams et al. as anticipatory of claim 1 is dictated by the application on the issued of anticipation of In re Hiniker Co., 150 F.3d 1362, 1369, 47 USPQ2d 1523, 1529 (Fed. Cir. 1998) and, more particularly, the holding therein that on the issue of anticipation all limitations of a claim must be considered, i.e., the reference to the proposition "the name of the game is the claim," which appears on the cited page of Hiniker. Clearly the different widths of the length portions of 16 and 12 of the integral strap 10 would prohibit cutting lengthwise, i.e., along a straight line, to effectuate any removal of selvage that would obviate a raw cut edge appearance.

Thus, one is led away from the notion of making the strap 16 like the pad 12 by the recitations of the claim and these same recitations clearly distinguish over Hyams et al.

For the foregoing reasons the rejection of the claim based on Hyams et al, should be reversed.

Respectfully,

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1. A seamless shoulder strap of a brassiere comprising a superposed cooperating pair of an upper and of a lower elongated strip of fabric construction material in facing relation to each other characterized by opposite edges extending lengthwise of said elongated strips and oriented in parallel relation to each other and bounding therebetween a correspondingly elongated internal compartment, each said strip as a work-in-process having cut raw edges therealong delimiting therebetween a selected first transverse dimension, an intermediate strip of thermoplastic fibrous material having an interposed operative position disposed lengthwise in said internal compartment, said intermediate strip as a work-in-process having cut raw edges therealong delimiting therebetween a selected transverse dimension slightly in excess of said first transverse dimension of said upper and lower fabric strips, said size differences of said first and second transverse dimensions presenting in superposed relation said work-in-process cut raw edges of said upper, lower and intermediate fabric strips which are fused along a selected site together and after said fusing said superposed upper, lower and intermediate fabric strips converted into said seamless shoulder strap of a brassiere by the removal by cutting along said site of said raw edges, whereby appearances of cut raw edges of said upper, lower and intermediate strips are obviated in the resulting shoulder strap.